

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA,

Plaintiff,

v. // CRIMINAL ACTION NO. 1:08CR83
(Judge Keeley)

EDGAR HENRY and
KIMBERLEY HENRY,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION TO CONTINUE,
ADOPTING THE REPORT AND RECOMMENDATION, AND
AMENDED SCHEDULING ORDER

On March 3, 2009, Defendant Kimberley Henry moved the Court to continue the final pretrial conference and trial in this case (dkt. no. 47). On March 4, 2009, Defendant Edgar Henry joined his co-defendant's motion to continue (dkt. no. 48).

On March 19, 2009, the Court held a hearing on the pending motion to continue. In continuing the trial, a court must address the speedy trial issues raised by the continuance. See Zedner v. U.S., 547 U.S. 489, 506-07 (2006). Under the Speedy Trial Act, 18 U.S.C. §3161(c)(1), "the trial of a defendant . . . shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs." See United States

ORDER GRANTING DEFENDANTS' MOTION TO CONTINUE,
ADOPTING THE REPORT AND RECOMMENDATION, AND
AMENDED SCHEDULING ORDER

v. Eady, 64 Fed. Appx. 874, 875 (4th Cir. 2003); United States v. Jarrell, 147 F.3d 315, 317 (4th Cir. 1998). In the present matter, the Indictment was returned on October 7, 2008, and both defendants, Edgar Henry and Kimberley Henry, made their initial appearances before United States Magistrate Judge John S. Kaull on October 30, 2008. Therefore, the speedy trial time in this case was scheduled to run on January 8, 2009.

Pursuant to 18 U.S.C. §3161(h), however, the Court may exclude certain time periods from the 70-day speedy trial requirement. Among those excluded time periods are:

Delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion; [and]

Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.

18 U.S.C. § 3161(h)(1)(D) and (h)(7)(A), respectively.

Prior to the filing of any motion in this case, sixteen (16) days had run on the speedy trial clock. On November 16, 2008,

**ORDER GRANTING DEFENDANTS' MOTION TO CONTINUE,
ADOPTING THE REPORT AND RECOMMENDATION, AND
AMENDED SCHEDULING ORDER**

Kimberley Henry filed two motions to suppress evidence (dkt. no. 16 and 17). After conducting hearings on December 3 and 22, 2009, and on January 20, 2009, United States Magistrate Judge John S. Kaull issued a Report and Recommendation ("R&R") recommending that the motions to suppress be denied (dkt. no. 45). The motions to suppress and the R&R were still pending at the time of the hearing on March 19, 2009. Moreover, on December 18, 2008, the Court granted the government's motion to continue and made speedy trial calculations that tolled the speedy trial clock until the new trial date of March 25, 2009.

Consequently, the speedy trial clock has been tolled at sixteen (16) days since November 16, 2008; thus, fifty-four (54) days of speedy trial time remain, pursuant to 18 U.S.C. § 3161(h)(1)(F). Pursuant to 18 U.S.C. § 3161(h)(7)(A), the speedy trial clock will remain tolled from the entry of this Order granting the defendants' motion to continue until the new trial date.

Pursuant to 18 U.S.C. § 3161(h)(7), and because of the urgent medical issues facing the defendant Kimberley Henry as described in her motion, the Court finds that the ends of justice served by continuing this trial beyond the speedy trial deadline of March 25,

**ORDER GRANTING DEFENDANTS' MOTION TO CONTINUE,
ADOPTING THE REPORT AND RECOMMENDATION, AND
AMENDED SCHEDULING ORDER**

2009 outweigh the interest of the public and the defendant in a speedy trial. Accordingly, the Court **GRANTS** the defendant Edgar Henry's motion to join (dkt. no. 48), **GRANTS** the defendants' joint motion to continue (dkt. no. 47), and reschedules the jury selection and trial of this case to **June 1, 2009 at 9:30 a.m.** at the **Clarksburg, West Virginia** point of holding court. The speedy trial clock will toll at sixteen (16) days until that date.

In addition, for the reasons stated on the record during the March 19, 2009 hearing, the Court **OVERRULES** the defendant Kimberley Henry's objections to the R&R (dkt. no. 49), **DENIES AS MOOT** the defendant Edgar Henry's motion to join in his co-defendant's objections (dkt. no. 51), **OVERRULES** his supplemental objections to the R&R (dkt. no. 51), **ADOPTS** the R&R (dkt. no. 45) in its entirety, and **DENIES** the defendants' motions to suppress evidence (dkt. nos. 16 and 17).

The Court also **ORDERS** that the following table of dates and deadlines shall govern the further preparation of this case:

TABLE OF DATES AND DEADLINES	
GIGLIO AND ROVIARO	May 18, 2009
JENCKS ACT MATERIAL	May 18, 2009

ORDER GRANTING DEFENDANTS' MOTION TO CONTINUE,
ADOPTING THE REPORT AND RECOMMENDATION, AND
AMENDED SCHEDULING ORDER

PROPOSED VOIR DIRE, JURY INSTRUCTIONS	May 20, 2009
MOTIONS IN LIMINE	May 14, 2009
RESPONSES TO MOTIONS IN LIMINE	May 20, 2009
PLEA AGREEMENT	May 21, 2009
PRETRIAL CONFERENCE	May 26, 2009 1:00 p.m.
TRIAL DATE	June 1, 2009 9:30 a.m. Clarksburg, WV
FINAL LIST OF WITNESSES	May 18, 2009
FINAL LIST OF EXHIBITS	May 18, 2009

1. **GIGLIO AND ROVIARO:** Rule 404(b), Giglio and Roviario evidence shall be disclosed on or before **May 18, 2009**.

2. **JENCKS ACT MATERIAL:** It is requested that the government disclose materials described in 18 U.S.C. Section 3500 (Jencks Act material) on or before **May 18, 2009**.

3. **PROPOSED VOIR DIRE AND JURY CHARGE:** All proposed voir dire questions and proposed jury instructions shall be filed by counsel with the Court and opposing counsel on or before 5:00 p.m. **May 20, 2009**.

If the instructions, voir dire, in this case are prepared on a computer in a software program compatible with WordPerfect 12.0

ORDER GRANTING DEFENDANTS' MOTION TO CONTINUE,
ADOPTING THE REPORT AND RECOMMENDATION, AND
AMENDED SCHEDULING ORDER

or lower, counsel are requested to provide to the Court a disk labeled as to the case name and party proposing the instructions. If the request for a disk with the noted information is not followed, sanctions may occur. The envelope containing the disk should be marked "Contains Disk -- Do Not X-ray -- May be Opened for Inspection." The disk will be returned to counsel if requested.

4. **WITNESS LIST**: By 5:00 p.m., May 18, 2009, counsel for each party shall file a list of probable witnesses and possible witnesses (identified as such), but not whether or not the defendant shall be a witness. The list shall state the full name and address of each witness and shall also contain a brief statement of the subject matter to be covered by each witness. Expert witnesses and record custodians shall be identified as such on the list.

5. **EXHIBIT LIST**: By 5:00 p.m. May 18, 2009, counsel for each party shall file with the court and with opposing counsel a list of exhibits to be offered at trial. In addition, counsel for each party shall number the listed exhibits with evidence tags with may be obtained from the clerk and shall exchange a complete set of

ORDER GRANTING DEFENDANTS' MOTION TO CONTINUE,
ADOPTING THE REPORT AND RECOMMENDATION, AND
AMENDED SCHEDULING ORDER

marked exhibits with opposing counsel (except for large or voluminous items or other exhibits that cannot be reproduced easily).

6. **MOTIONS IN LIMINE**: All motions in limine, (which must be limited to matters actually in dispute) shall be filed by counsel on or before **5:00 p.m. May 14, 2009**. Responses are due **May 20, 2009**.

7. **PLEA AGREEMENT**: If this matter results in the formulation of a plea agreement, counsel shall submit to the Court the executed plea agreement or an unexecuted final proposed agreement by **5:00 p.m. May 21, 2009**.

8. **PRETRIAL CONFERENCE**: A pre-trial conference shall be held before the Honorable Irene M. Keeley on **May 26, 2009 at 1:00 p.m. at the Clarksburg, West Virginia** point of holding court.

9. **TRIAL**: Jury selection in this action shall be held on **June 1, 2009 at 9:30 a.m. at at the Clarksburg, West Virginia** point of holding court. Trial will commence upon the completion of jury selection This case is presently the first case on the trial docket for that week.

It is so **ORDERED**.

ORDER GRANTING DEFENDANTS' MOTION TO CONTINUE,
ADOPTING THE REPORT AND RECOMMENDATION, AND
AMENDED SCHEDULING ORDER

The Clerk is directed to transmit copies of this Scheduling Order to counsel of record.

DATED: March 20, 2009.

/s/ Irene M. Keeley
IRENE M. KEELEY
UNITED STATES DISTRICT JUDGE